Office-Supreme Court, U.S.
FILED
FEB 16 1983
ALEXANDER L. STEVAS,
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No. 82-869

IN THE

Supreme Court of the United States

October Term, 1982

PHILIP ALAN FROUDE, et al.,
Petitioners

v.

EAGLE-PICHER INDUSTRIES, INC., et al.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

APPENDIX TO BRIEF OF RESPONDENT AMERICAN MOTORISTS INSURANCE COMPANY

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 81-1761 to 81-1763.

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Defendants, Appellees.

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellee,

v.

LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Defendants, Appellees,

Philip Alan Froude, et al.,
Defendants, Appellants.

EAGLE-PICHER INDUSTRIES, INC.,
Plaintiff, Appellee,

v.

LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Defendants, Appellees,

American Motorists Insurance Company,
Defendant, Appellant.

Argued March 4, 1982.
Decided June 30, 1982.
Rehearings Denied Aug. 30, 1982.

Before COFFIN, Chief Judge, CAMPBELL and BOWNES, Circuit Judges.*

COFFIN, *Chief Judge.*

Eagle-Picher Industries, Inc., manufactured a variety of industrial insulation products containing asbestos. Beginning in the late 1960's, and accelerating rapidly in the mid-1970's, Eagle-Picher has been named as a defendant in lawsuits in which plaintiffs allege personal injury or wrongful death resulting from the inhalation of asbestos from Eagle-Picher's products. Between 1968 and 1980, Eagle-Picher was covered by numerous insurance policies provided by several different carriers. In 1977, Eagle-Picher's primary insurer, Liberty Mutual Insurance Co., notified Eagle-Picher that the policy limits for 1974 and 1975 were about to be reached. Eagle-Picher sent this notice to its excess insurers, American Motorists Insurance Co. and various underwriters in the London Market. American Motorists responded, arguing that Liberty Mutual had been construing its policy incorrectly and implying that Liberty Mutual's coverage would not be exhausted under a proper interpretation. The London Market sent a reservation of rights letter to Eagle-Picher, pending resolution of the correct theory of insurability. Eagle-Picher subsequently brought this action, seeking a declaration of the rights and liabilities of its various insurers pursuant to the applicable policies.

Two theories of insurance coverage were presented to the district court. Eagle-Picher, Liberty Mutual, and various London Market underwriters referred to as the "Bird" underwriters argued for a "manifestation" theory: those insurers on the risk at the time the asbestos-related disease first manifested itself by way of medically diagnos-

* Aldrich, J., a member of the panel hearing argument, later recused himself and was replaced by Campbell, J.

able symptoms must provide coverage. American Motorists, and other London Market insurers known as the "Froude" underwriters, argued for an "exposure" theory: those insurers on the risk at the time of exposure to asbestos must indemnify Eagle-Picher for a pro-rata share of its liability, the proportion to be determined by the ratio of the number of years the insurer was on the risk to the total number of years of exposure. The district court, relying on the common meaning of the policy language, the medical evidence relating to asbestosis, and the policy of construing insurance contracts to promote coverage, ruled that the manifestation theory was correct. 523 F.Supp. 110 (D.Mass.1981).

The exposure theorists have appealed, alleging that the district court erred by excluding extrinsic evidence of Eagle-Picher's intent in obtaining the policies and that the court misconstrued the policies as a matter of law. Eagle-Picher has cross-appealed, relying on the recent decision in *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C.Cir.1981), *cert. denied*, — U.S. —, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982), to argue for the first time that all policies in force from the time of initial exposure until and including the time of manifestation are triggered by an asbestosis claim. Eagle-Picher also urges that the district court chose the wrong date of manifestation. Less consequential contentions are dealt with in the margin.[1] For the reasons that follow,

1. The exposure theorists argue that the district court erred in adjudicating this case for several reasons. First, they argue that there was no "case or controversy" between Eagle-Picher and Liberty Mutual and that Liberty Mutual should therefore have been dismissed from the action. But this controversy was triggered by American Motorists' claim that Liberty Mutual was construing its policy incorrectly; the Liberty Mutual policy is at the heart of the case. The fact that Liberty Mutual and Eagle-Picher agreed about the underlying basis of coverage is no reason to dismiss

we agree with most of the district court's thoughtful opinion but modify its judgment in part.

Eagle-Picher was uninsured for liability resulting from exposure to its asbestos products prior to 1968. Between January 1, 1968, and January 1, 1980, Liberty Mutual provided Eagle-Picher with primary comprehen-

1. (Cont'd.)

Liberty Mutual from the action. *See, e.g., Diamond Shamrock Corp. v. Lumbermens Mutual Casualty Co.*, 416 F.2d 707 (7th Cir. 1969).

Second, they argue that the district court erred by denying their motion to transfer the case to the Southern District of Ohio pursuant to 28 U.S.C. § 1404(a). The standard of review is a narrow one; we reverse only for an abuse of discretion. *See, e.g., Codex Corp. v. Milgo Electronic Corp.*, 553 F.2d 735, 737 (1st Cir.), *cert. denied*, 434 U.S. 860, 98 S.Ct. 185, 54 L.Ed.2d 133 (1977). Given that Liberty Mutual has its principal place of business in Boston, and that the exposure theorists have not demonstrated any prejudice as a result of a Massachusetts forum, we cannot say that the district court abused its discretion by refusing to override Eagle-Picher's choice of forum.

Finally, the exposure theorists urged the district court to deny declaratory relief because Eagle-Picher had failed to join additional insurers to this action. One of these insurers apparently provided first-layer excess coverage between 1968 and 1973; others provided additional umbrella coverage between 1973 and 1979. Eagle-Picher responded that it was entirely speculative whether these additional policies would ever be triggered. Without addressing the merits of this assertion, we note that our disposition of this case cannot be legally binding on non-parties. *See, e.g., State Farm Mutual Automobile Ins. Co. v. Mid-Continent Casualty Co.*, 518 F.2d 292, 295 (10th Cir. 1975); *Diamond Shamrock, supra.* In any case, no motion to join these parties to the action was made, nor was there a showing that joinder would destroy diversity jurisdiction or would be infeasible for any other reason. *See* Fed.R. Civ.P. 19. Declaratory relief here will resolve the present controversy, and leave potential conflicts with the other insurers for another time. The motion to decline declaratory relief was therefore properly denied.

sive liability insurance. From June 1, 1973, until October 1975, American Motorists provided Eagle-Picher with first layer excess umbrella coverage; from October 1975 through January 1, 1979, the London Market provided Eagle-Picher with first layer excess coverage. Each of these policies contains independent coverage clauses and definitions. In addition, the London Market provided Eagle-Picher with second layer excess coverage from September 1, 1973, to January 1, 1979; these policies incorporate by reference the terms of the underlying first layer excess policies. The excess policies go into effect only if the policy limits of the underlying coverage layer become exhausted.

The coverage clauses, which are set out in detail in the district court's opinion, are virtually identical, with the exception of the American Motorists policy. In essence, the insurer agrees to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . caused by an occurrence." An "occurrence" is defined as "an accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury." "Bodily injury" is defined as "bodily injury, sickness or disease." It is clear from this language that each occurrence is made up of two components, the exposure and the resulting bodily injury; and it is the resulting bodily injury, not the exposure, which must take place "during the policy period." 523 F.Supp. at 114; *see also Keene, supra,* 667 F.2d at 1040; *American Motorists Ins. Co. v. E.R. Squibb & Sons, Inc.,* 95 Misc.2d 222, 406 N.Y.S.2d 658, 659-60 (Sup.Ct.1978). The American Motorists policy states that the insurer shall indemnify the insured for liability due to "personal injury caused by . . . *an occurrence which takes place during the policy period.*" (Emphasis added.) The definition of "occur-

rence", however, is substantially identical to that in the other policies, as is the definition of "personal injury" as "bodily injury, . . . sickness or disease."

The principal issue in this case is whether asbestosis "results" soon after initial and subsequent exposure to asbestos, or whether the disease "results" when it becomes clinically evident or manifest. Secondarily, we must decide when an "occurrence . . . takes place" under the terms of the American Motorists policy.

Insurance policies are generally interpreted in the same way as other contracts.[2] In construing the policies at issue, our dominant purpose is to give effect to the intentions of the parties. Where the relevant language is unambiguous and the application of the policy to the relevant facts is clear, that intent must be ascertained by the plain and ordinary meaning of the contract language. Where, however, the policy terms are ambiguous and the coverage issue is reasonably disputed, a court may consider extrinsic evidence of the surrounding circumstances and of the parties' intent. For example, evidence of the construction given to the language by the parties and of the customary usage of persons in the same commercial setting is normally admissible. If the meaning of the policy terms remains unclear, the policy is generally construed in favor of the insured in order to promote the policy's objective of providing coverage. *See*

2. The exposure theorists sought a pre-trial ruling to determine whether the law of Ohio, Illinois, or England should control the interpretation of the policies. The district court concluded that there was "no true conflict among all potentially applicable laws" and therefore did not decide which state law applied. 523 F.Supp. at 116 n.5. *Cf. Keene, supra,* 667 F.2d at 1041 n.10 (similar). Although the basic principles of interpretation may not vary significantly from one jurisdiction to the next, we have sought to be consistent with Illinois and Ohio law, the parties having failed to indicate how the law of England might differ.

generally Pavlik v. Consolidation Coal Co., 456 F.2d 378, 380-81 (6th Cir. 1972)(Ohio law); *Bright v. Ohio Casualty Ins. Co.*, 444 F.2d 1341 (6th Cir. 1971) (Ohio law); *Olmstead v. Lumbermens Mutual Ins. Co.*, 22 Ohio St.2d 212, 259 N.E.2d 123, 126 (1970); *Construction Advancement Program v. A. Bentley & Sons Co.*, 45 Ohio App.2d 13, 340 N.E.2d 849, 853 (1975); *Zelinsky v. Associated Aviation Underwriters*, 478 F.2d 832, 834 (7th Cir. 1973) (Illinois law); *Universal Underwriters Ins. Co. v. Northwestern Nat'l Ins. Co.*, 306 F.Supp. 437, 439 (S.D. Ill.1969)(Illinois law); *Olipra v. Zambelli*, 1 Ill.App.3d 607, 274 N.E.2d 877, 879 (1971); 13 J. Appleman & J. Appleman, Insurance Law and Practice §§ 7381, 7384, 7385, 7388, 7401 (1976).

These well settled principles of construction are often easier to state than to apply. Here, for example, all parties agreed that the policy language was unambiguous. The exposure theorists nevertheless urged the court to consider extrinsic evidence of Eagle-Picher's reasonable expectations in signing the policies, not, apparently, to make clear what was unclear but to make more clear what was already clear. There is some authority for this position. Corbin suggests, in a passage apparently not brought to the district court's attention, that evidence of such surrounding circumstances should generally be admitted to enable the court to determine what the "plain and clear" meaning of the contract is. 3 Corbin on Contracts § 542 (1960); *see also* 4 Williston on Contracts §§ 609, 629 (3d ed. 1961).

Given that the primary goal of contract interpretation is to ascertain the intentions of the parties, *see* Appleman, *supra*, § 7385; Corbin, *supra*, § 538; Williston, *supra*, § 601, a district judge, sitting without a jury, might be well advised to admit provisionally all extrinsic evidence of the parties' intent, unless it is clearly inadmissible, privileged, or too time consuming, in order to guard against reversal.

See, e.g., United States ex rel. Placek v. Illinois, 546 F.2d 1298, 1307 n.9 (7th Cir. 1976); *Elkins v. Townsend*, 296 F.2d 172, 177 (5th Cir. 1961); *Builders Steel Co. v. Commissioner of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950); 10 Moore's Federal Practice §§ 103.21, 103.23 (1982); 1 Weinstein's Evidence ¶ 103[04] at 103-39 (1981). Where there is adequate admissible evidence to support the findings of the trial judge, any error in admitting other evidence will generally be deemed harmless. *See, e.g., Trio Process Corp. v. L. Goldstein's Sons, Inc.*, 461 F.2d 66, 71 n.11 (3d Cir.), *cert. denied*, 409 U.S. 997, 93 S.Ct. 319, 34 L.Ed.2d 262 (1972); *Baumel v. Travelers Ins. Co.*, 279 F.2d 780, 783 & n.4 (2d Cir. 1960). The district court here, however, taking the parties' position that the policy language was plain and clear—though the parties were diametrically opposed in their reading of what was plainly and clearly stated—refused the invitation to consider extrinsic evidence of intent, accepting only medical testimony bearing on the nature of asbestosis.

Based on this evidence, the district court found that asbestosis is an injurious process which begins with the deposition of asbestos fibers in the lung, causing tiny sub-clinical "insults" to the lung tissue, and ends with the manifestation of clinically evident disease after a period of as much as twenty years or longer. The medical experts agreed that the sub-clinical injuries do not occur simultaneously with initial exposure; rather, before any "insults" to the lung occur, the asbestos fiber must travel through a number of passageways in the throat and lungs and evade the body's natural defense mechanisms which are designed to prevent foreign substances from entering the body. "Moreover, even when the fiber has become embedded in the lung and the scarring process has begun, the end result, that is, disabling disease or death, is by no means inevitable." 523 F.Supp. at 115. *See also Insurance Co.*

of North America v. Forty-Eight Insulations, Inc., 451 F.Supp. 1230, 1236-37 (E.D.Mich.1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *modified on reh'g*, 657 F.2d 814, *cert. denied*, — U.S. —, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981). Finally, one expert distinguished between the specialized meaning of "asbestosis" to a research scientist —an injury mechanism which is present soon after the first asbestos fiber is deposited in the lung—and the ordinary meaning of the word to a treating physician or patient—a clinically evident disease.

Even adopting the terminology of a medical expert, the policy language does not support the exposure theory. The policies clearly distinguish between the event which causes injury—the accident or exposure—and the resulting injury or disease. Yet, putting aside the American Motorists policy, it is the resulting injury, *not* the exposure, which must take place "during the policy period" in order to trigger coverage; and it is uncontested that even subclinical injury to the lung does not occur simultaneously with the inhalation of asbestos.[3] Nor is the existence of

3. The fiction that bodily injury is contemporaneous with exposure to asbestos seems to have even less factual basis with respect to other asbestos-related diseases, such as mesothelioma and broncheogenic carcinoma, than it does with respect to asbestosis. Although the likelihood of onset of these diseases appears to be dose-related, *see Forty-Eight, supra*, 657 F.2d at 815, they are apparently not cumulative in nature like asbestosis, *see* Vagley & Blanton, Aggregation of Claims: Liability for Certain Illnesses With Long Latency Periods Before Manifestation, 16 Forum 636 (Spring 1981). The district court did not consider these diseases separately from asbestosis, but the parties do not argue that they should be treated differently under the policies. Given the desirability of similar treatment of all asbestos-related diseases, the manifestation theory has the advantage of being more compatible with the medical evidence and the policy language. *But cf. Keene, supra*, 667 F.2d at 1038 n.3 (disregarding details of medical development of diseases); *Forty-Eight, supra*, 657 F.2d at 815 (rely-

sub-clinical injury an inevitable by-product of exposure, since the body's natural mechanisms may remove the fibers before they become embedded in the lungs. We would also observe that, if a single exposure to asbestos was intended to trigger coverage, the policy language would likely have reflected this intent, rather than defining an "occurrence" in part as a "continuous or repeated" exposure to conditions.

Moreover, we agree with the district court that the common, ordinary meaning of the policy language supports the manifestation theory. An individual with tiny sub-clinical insults to her lungs would not say that she had any injury or disease, given one expert's testimony that "over 90% of all urban city dwellers have asbestos-related scarring". Rather, she would say that a disease resulted when she had symptoms which impaired her sense of well-being, or when a doctor was able to detect sufficient scarring to make a prognosis that the onset of manifested disease was inevitable. "Injury" is defined by Webster[4] as "hurt, damage, or loss sustained"; it is a broad term which covers the "result of inflicting on a person or thing something that causes loss, pain, distress, or impairment." As sweeping as this definition is, it is difficult to consider sub-clinical insults to the lung to constitute an "injury" when these insults do not cause "loss, pain, distress, or

3. (Cont'd.)

ing on administrative convenience to treat mesothelioma and carcinoma under exposure theory in spite of contrary medical evidence).

4. We note that the Ohio courts have relied on definitions in Webster's Third New International Dictionary (1966) to determine the plain, ordinary meaning of language in insurance policies. *See, e.g., Fuerstenberg v. Mowell*, 63 Ohio App.2d 120, 409 N.E.2d 1035, 1036-37 (1978); *Olmstead v. Lumbermens Mutual Ins. Co.*, 23 Ohio App.2d 185, 261 N.E.2d 671, 674 (1969), *aff'd*, 22 Ohio St.2d 212, 259 N.E.2d 123, 126 (1970).

impairment" until, if ever, they accumulate to become clinically evident or manifest.

Finally, the policies distinguish between "bodily injury" and "sickness or disease". If the terms are to have any distinct meaning, "bodily injury" is most easily thought of as an injury caused by external violence or impact. *See, e.g., Burns v. Employers' Liability Assur. Corp.*, 134 Ohio St. 222, 16 N.E.2d 316, 320-21 (1938); *Chase v. Business Men's Assur. Co.*, 51 F.2d 34, 36 (10th Cir. 1931). Asbestosis, by contrast, is normally considered to be a disease, not a bodily injury. Webster defines "asbestosis" as "a form of pneumoconiosis", and this latter term is identified as "a disease of the lungs". "Disease", in turn, is defined as "an impairment of the normal state of the living animal . . . or of any of its components that interrupts or modifies the performance of the vital functions". Every disease is presumably preceded by the onset of sub-clinical changes in the body. To state that the disease occurs when these sub-clinical alterations take place, where, as here, the disease does not inevitably or even usually result from the sub-clinical changes, is to subvert the plain meaning of "disease" and to read the term entirely out of the policy.

Our view of the plain meaning of the policy language is reinforced by analogous cases involving the interpretation of individual health insurance policies.[5] These agree-

5. Courts have also adopted a manifestation approach in areas of the law other than liability and health insurance. *See, e.g., Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949) (statute of limitations for disease of silicosis does not begin to run until disease manifests itself, in spite of cumulative nature of disease); *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151 (6th Cir. 1981) (under Ohio law, statute of limitations for asbestos-related disease does not begin to run until disease manifests itself); *Grain Handling Co. v. Sweeney*, 102 F.2d 464, 466 (2d Cir.) (L. Hand, J.), *cert. denied*, 308 U.S. 570, 60 S.Ct. 83, 84 L.Ed. 478

ments often require that illness or disease originate after a certain date in order for coverage to be provided. The courts, relying on the common meaning of the relevant language, have consistently held that the disease does not result until it becomes "manifest or active"; coverage is not defeated by a showing that the disease previously lay dormant in the body. *See, e.g., Broccolo v. Horace Mann Mutual Casualty Co.*, 37 Ill.App.2d 493, 186 N.E.2d 89, 91 (1962); *Cohen v. North American Life & Casualty Co.*, 150 Minn. 507, 185 N.W. 939 (1921); *Reiser v. Metropolitan Life Ins. Co.*, 262 A.D. 171, 28 N.Y.S.2d 283, 286 (App.Div. 1941), *aff'd per curiam*, 289 N.Y. 561,

5. (Cont'd.)

(1939) (under Longshoremen's Act, an industrial disease "is no disease until it manifests itself"). Although these and similar cases can be distinguished on various grounds, *see, e.g., Keene, supra*, 667 F.2d at 1043 & n.17; *Forty-Eight, supra*, 633 F.2d at 1220-22, they still support the argument that the manifestation theory is a reasonable approach to determining when disease results and that it comports with the common meaning of the language. Judge Hand's discussion, though admittedly in a different context, is particularly instructive:

> "Few adults are not diseased, if by that one means only that the seeds of future troubles are not already planted; and it is a common place that health is a constant warfare between the body and its enemies: an infection mastered, though latent, is no longer a disease, industrially speaking, until the individual's resistance is again so far lowered that he succumbs." *Sweeney, supra*, at 466.

Moreover, we note that both the *Keene* and *Forty-Eight* courts acknowledged the force and relevance of the health insurance cases discussed in text. The *Keene* court accordingly adopted manifestation as one trigger of coverage; the *Forty-Eight* court distinguished the health insurance cases by relying on their underlying premise of construing policies in favor of the insured. Here, by contrast as discussed *infra*, this rule of construction supports the manifestation, not the exposure, theory.

43 N.E.2d 534 (1942); *Wilkins v. Grays Harbor Community Hosp.*, 71 Wash.2d 178, 427 P.2d 716, 719 (1967). As one oft-quoted commentator has summarized the law, the provisions requiring disease to originate after a specified time "are strictly construed against the insurer, and the illness, disease, or disability will ordinarily be deemed to have its inception when it first becomes manifest or active, or when there is a distinct symptom or condition from which one learned in medicine can with reasonable accuracy diagnose the disease." 10 Couch on Insurance § 41:814 at 639 (2d ed. 1962 and 1981 Supp.).

The exposure theorists, of course, dispute this characterization of the policy language and of the medical evidence. In their view, sub-clinical insults to the lung clearly constitute "bodily injury". *See Forty-Eight, supra*, 633 F.2d at 1218-19; *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, Civil Action No. 81-2129, slip op. at 22-25 (E.D.Pa. Dec. 4, 1981). Moreover, they argue that evidence erroneously excluded by the district court would have demonstrated that "prior to the initial issuance of the London Market and American Motorists insurance contracts, in 1973, Eagle-Picher knew or reasonably should have expected that coverage under these contracts would be afforded on an exposure basis." They further argue that the fact that Eagle-Picher and Liberty Mutual negotiated a special agreement on April 6, 1972, which provided that all asbestosis claims would be handled on a manifestation basis, shows that Eagle-Picher could not have expected such coverage under the standard policy language in the absence of a special agreement.

In reviewing the action of the district court, it is important to note how the issue was raised below. Had it been argued that the policy language was ambiguous and that therefore, under the traditional rule, parol evidence should be admitted to shed light on the meaning of terms,

we would have a different and more compelling case. Should we then have determined, contrary to the district court, that the policy language was ambiguous as a matter of law, *see, e.g., Keene, supra,* 667 F.2d at 1043; *Forty-Eight, supra,* 633 F.2d at 1222, the exclusion of extrinsic evidence would have constituted error. But the issue of ambiguity was not raised below and has not been urged on appeal, and we therefore do not consider it as a basis for error. The offer of proof specifically recited that, except for medical evidence, "no extrinsic evidence is necessary . . . to ascertain the intention of the parties." The offer was put in these terms: "[A] court may, if it wishes to do so, consider objective evidence of some of the circumstances surrounding the making of the agreement . . . in order to aid in its interpretation." [6]

6. The parties favoring the exposure theory also argued that extrinsic evidence of Eagle-Picher's insurance sophistication and bargaining power should have been admitted to rebut the presumption that the policies were contracts of adhesion. The court rejected the offer of evidence for this purpose, concluding that whether or not the policies were contracts of adhesion could be determined simply by reading the policies. Although the relative bargaining power of the parties would seem relevant to a determination of how strongly ambiguous language should be construed against the insurer who drafted the policy, *compare Commercial Ins. Co. of Newark v. Gonzalez,* 512 F.2d 1307, 1313 n.11 (1st Cir.), *cert. denied,* 423 U.S. 838, 96 S.Ct. 65, 46 L.Ed.2d 57 (1975), *with Marston v. American Employers Ins. Co.,* 439 F.2d 1035, 1038-39 (1st Cir. 1971), we have not been pointed to any Ohio or Illinois cases which have abandoned entirely or even weakened the presumption of construing ambiguous language in favor of the insured upon a finding that the insured had significant bargaining power.

The proffered evidence does not demonstrate that Eagle-Picher had unusual sophistication with respect to liability insurance, or that its small corporate insurance department allowed it to bargain as an equal with insurance industry representatives. Certainly the offer of proof does not show that Eagle-Picher "had so actively participated in drafting [the policies] that it should be denied the

The precise question before us, therefore, is whether the district court committed either an error of law or abuse of discretion in excluding the evidence offered for the purpose indicated, and whether any such error was harmless. Even Corbin, who was perhaps the principal critic of conventional analysis and advocated the reception of extrinsic evidence to aid in interpretation of even a "plain and clear" contract, Corbin, *supra*, §§ 542, 579, realized that "[j]ust when the court should quit listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense." *Id.* § 579 at 420. Assuming *arguendo* that courts should be more flexible in receiving extrinsic evidence such as antecedent communications to help in interpreting legally plain and clear agreements, we review only for abuse of discretion.

The proffered evidence, summarized in detail in the margin, consisted mainly of an exchange of correspondence between Eagle-Picher's corporate insurance manager and the claims supervising personnel of Liberty Mutual concerning three asbestos-related claims between 1969 and 1971.[7] Two of these, the Antholtz and McDaniel claims,

6. (Cont'd.)

benefit of the usual rule" of construction in favor of the insured. *First Nat'l Bank of Decatur v. Insurance Co. of North America*, 424 F.2d 312, 317 (7th Cir.) (Illinois law), *cert. denied*, 398 U.S. 939, 90 S.Ct. 1844, 26 L.Ed.2d 272 (1970). In any case, the district court relied on the policy of liberal construction in favor of the insured only as an "additional strand of support", not as the pillar, for its holding. The court committed no mistake in construing the policies as it did, and any error in excluding evidence of Eagle-Picher's bargaining power was harmless. Fed.R.Civ.P. 61.

7. *The Borel claim:* Letters from Eagle-Picher forwarding the complaint to insurers in 1969 recognized the possibility of no coverage. Liberty Mutual, in a February, 1970, letter to Eagle-Picher indicated that it would cease to handle the claim if it determined

seem to be cases where both exposure and manifestation had occurred prior to the issuance of the first Liberty Mutual policy on January 1, 1968. The exchanges made

7. (Cont'd.)

there was no exposure during coverage. In June, 1971, Liberty Mutual acknowledged receiving Eagle-Picher's demand that Liberty Mutual assume total responsibility in a settlement; it refused and agreed to pay only 20% of the settlement. Eagle-Picher indicated in September, 1971, that the case settled for $5000, plus "the proportionate part of the compensation lien," and reserved its right to litigate the issue of coverage. In October Liberty Mutual paid half of the total settlement of $6225.55 and $7000 of total counsel fees of $22,028.78.

The Antholtz claim: In February, 1971, Eagle-Picher forwarded to Liberty a complaint alleging exposure during 1939-1967 which resulted in death in March, 1970, after the onset of asbestosis for "a period of several years". Eagle-Picher's letter acknowledged "the slim possibility of subsequent findings which would indicate exposure after the effective date of coverage." (In fact, there would seem to have been no coverage under either the exposure or manifestation theories, asbestosis having been alleged to have manifested itself prior to 1968.) Liberty Mutual responded that "in the event you feel there is coverage . . . you will write us again." In May, 1971, Liberty Mutual wrote that it had determined there was no coverage because exposure was prior to 1968. A year later, on April 12, 1972 (six days after the April 6 manifestation agreement), Eagle-Picher paid $2000 to obtain a dismissal of the complaint with prejudice.

The McDaniel claim: In July, 1971, Eagle-Picher forwarded to Liberty a claim for exposure during the years 1933 to 1968, with death occurring in March, 1968, after total disability and total loss of wages during the prior six months. Eagle-Picher noting the exposure dates, indicated on July 7, 1971, to Liberty that it would turn the case over to its own counsel for representation, but Liberty responded on July 19, 1971, by refusing to allow Eagle-Picher's counsel to handle the matter without home office approval. Long after the April 6, 1972 agreement, in July, 1975, Eagle-Picher paid all of a $4000 settlement and all but $700 of a $9000 counsel fee. As these facts indicate, manifestation apparently occurred prior to the January, 1968, date of Liberty Mutual's coverage.

several references to exposure but without reflecting any established, inflexible philosophy. While some letters from both parties intimated a possible lack of coverage because of dates of exposure, others reflected uncertainty on the part of both. Still others revealed a conflict of views, and contributions to the one settlement that pre-dated the April 6, 1972, agreement (Borel) represented what was obviously a compromise.

Certainly the proffered evidence reveals nothing approaching a clear "course of dealing", in a Uniform Commercial Code sense, between the parties. *See, e.g., Chase Manhattan Bank v. First Marion Bank*, 437 F.2d 1040, 1045-46 (5th Cir. 1971). Nor was there ever offered, despite an expressed intention to offer, evidence of any widespread insurance industry "usage of trade" favoring the exposure theory and rejecting the manifestation theory.[8] *Id.* What was offered was a limited series of exchanges reflecting uncertainty, tentative positions, and compromise. Assuming that a Corbin approach should be encouraged, we are not convinced that the district court abused its discretion in rejecting this material. We have been pointed to no case where a judgment has been set aside

8. Various *amici curiae* have sought to enlarge the record on appeal by offering evidence of the drafting history of the standardized liability policies at issue here, which is said to support the exposure position. But this is not the sort of material of which we may take judicial notice, and we may not ordinarily consider factual material not presented to the court below. *See, e.g., Construction Aggregates Corp. v. Rivera de Vicenty*, 573 F.2d 86, 95 n.7 (1st Cir. 1978). Nor will we reverse the district court on a ground not urged upon or considered by it, in the absence of exceptional circumstances not present here. *See, e.g., Dobb v. Baker*, 505 F.2d 1041, 1044 (1st Cir. 1974). For it is the duty of counsel in the first instance to determine whether there is material so likely to be known throughout the industry and by the parties that it should be proffered to the court.

because a court refused to admit extrinsic evidence offered in like circumstances. Moreover, having reviewed the offer of proof, we are convinced that it cannot reasonably be construed to establish the exposure theory as the proper interpretation of the Liberty Mutual policies or of the other policies agreed to later. Any error by the district court in excluding the evidence was therefore harmless, and cannot be the basis for modifying or vacating the court's judgment. Fed.R.Civ.P. 61; *see, e.g., Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8, 14 (9th Cir. 1973), *cert. denied*, 417 U.S. 932, 94 S.Ct. 2643, 41 L.Ed.2d 235 (1974).

Although in our view the medical testimony and the plain meaning of the policy language strongly support the manifestation approach, any remaining doubts about interpretation of the policies are properly resolved in favor of the insured, in order to effectuate the policies' purpose of providing coverage. Here, Eagle-Picher was uninsured prior to 1968, the period in which most of the injury-producing exposure took place. Yet Eagle-Picher purchased general liability insurance in 1968, and continued to purchase it in increasing amounts throughout the 1970's, even though it ceased to manufacture products containing asbestos in 1971 or 1972. Although, contrary to the district court's assertion, it is reasonable to assume that exposure to Eagle-Picher's products was continuing throughout the 1970's, *see Forty-Eight, supra*, 451 F.Supp. at 1233, such exposure was undoubtedly declining and not increasing. Coverage based on manifestation was certainly more desirable than coverage based on exposure, given that Eagle-Picher was uninsured during the longest period of exposure and that the number of claims was accelerating during the period of coverage. That Eagle-Picher and Liberty Mutual agreed to interpret their policies on a manifestation basis in April, 1972, also

shows that Eagle-Picher intended such an approach once the issue of manifestation versus exposure had been considered. We therefore agree with the district court that, in this case, the public policy underpinnings of insurance law support the manifestation result.

On appeal, Eagle-Picher relies heavily on the policy of construing insurance contracts in favor of the insured to argue that all insurers on the risk from the period of initial exposure to the time of manifestation must provide coverage. This was the position recently adopted by Judge Bazelon for the court in *Keene, supra.* Although we agree with the *Keene* court that ambiguity must be resolved in favor of the insured, we believe the court's primary objective in these cases should be to ascertain the intentions of the parties. To state that a court must first "give effect to the policies' dominant purpose of indemnity", *id.* at 1041, is to weight too heavily a *presumed* intention to maximize coverage. But, given Eagle-Picher's stance in the district court, the rationale and holding of *Keene* are unavailing for another reason. In *Keene,* the court construed the policies in order to fulfill the "reasonable expectations of [the insured] when it purchased the policies." *Id.* at 1041, 1044-46. Whatever the expectations of the insured in that case, it is clear that Eagle-Picher had no similar expectations here, or it would certainly have argued such a theory in the court below.

We are also unable to agree with the analysis of the policy language and the medical evidence in *Forty-Eight, supra,* for the reasons outlined above. We note additionally, however, that there are factual differences between that case and this one. The extrinsic evidence in that case tended to show that the parties advocating the manifestation theory had previously adopted an exposure approach in handling early claims. Thus the manifestation approach was contradicted by the parties' prior con-

struction of the policies.[9] Although we disagree with the *Forty-Eight* court as to the implications of the medical evidence and the plain meaning of the policy language, to the extent that the court was influenced by the evidence of the parties' intent and by the principle of maximizing coverage, it would have difficulty in rejecting the result we reach here.

Our construction of the contract language requiring bodily injury to "result" during the policy period is fully applicable to the identical language in the American Motorists agreement. While the coverage clause of the American Motorists policy, unlike the other policies, also refers to an "occurrence during the policy period", the definition of occurrence is identical to that in the other agreements, requiring the resulting injury, not the exposure, to take place during the policy period.

There are two plausible readings of the policy language. First, the requirement of an "occurrence during the policy period" might be intended simply to emphasize that the accident or exposure must "result[], during the policy period, in personal injury." Second, as American Motorists argues, the langauge might be designed to require the accident or exposure, *as well as* the resulting injury, to take place while the policy is in force. In ordinary personal injury cases, there will be no practical difference between these two interpretations: the accident and resulting injury take place almost simultaneously, and either both or neither will occur during the policy period. In latent injury cases, however, the construction favored

9. In addition, unlike the present case, the manufacturer in *Forty-Eight* was insured beginning in 1955, and carried insurance during a substantial period of exposure to its products. Noting that "the manufacturer will likely be unable to secure any insurance coverage in later years when the disease manifests itself", *id.* at 1219, the court concluded that the exposure construction would maximize the manufacturer's coverage, *id.* at 1223.

by American Motorists would severely restrict coverage. Only in relatively few cases would a plaintiff be exposed *and* injured during a one year policy period. Given the identical definition of "occurrence" as in the other policies, and the absence of any extrinsic evidence to support a narrow interpretation, Eagle-Picher could reasonably expect meaningful coverage similar to its other policies. We therefore construe this ambiguous policy language in favor of Eagle-Picher in order to promote coverage, and rule that "occurrence during the policy period" means no more than that injury must result during the policy period as in the other agreements.[10]

Finally, although we agree with the district court that the manifestation approach is correct, we disagree as to the appropriate definition of the manifestation date. The court recognized that injury results when the disease is "capable of diagnosis", 523 F.Supp. at 115, but held that "the date of actual diagnosis" or the date of death triggers coverage under the policies, 523 F.Supp. at 118. This holding was designed "not only to reflect the manifestation concept, but also to ensure that coverage is certain, and [that] the availability of coverage is easily ascertained and easily demonstrated." *Id.* But administrative convenience, however desirable, cannot override the principles of construction we outlined earlier. The policy language clearly requires that exposure *result* in bodily injury dur-

10. The district court, in reaching this same conclusion, also relied on *American Motorists Ins. Co. v. E. R. Squibb & Sons, Inc.*, 95 Misc.2d 222, 406 N.Y.S.2d 658, 659-60 (Sup.Ct.1978). Although that case involved an American Motorists policy, the language was apparently different. The *American Motorists* court did not state that the contract required an "occurrence during the policy period." Rather, the court concluded that the clear language keyed the resulting injury, not the exposure, to the policy period. If this was the case, the policy was essentially the same as that of Liberty Mutual and the other excess carriers here.

ing the policy period, not that the injury be *medically diagnosed* during the policy period. The existence of clinically evident, diagnosable disease is in no way dependent upon actual diagnosis.[11]

Courts and commentators which have interpreted analogous health insurance policies have reached a similar conclusion: a disease results "when there is a distinct symptom or condition from which one learned in medicine can with reasonable accuracy diagnose the disease." *See, e.g., Malone v. Continental Life and Accident Co.*, 89 Idaho 77, 403 P.2d 225, 228 (1965); *Broccolo, supra; Dowdall v. Commercial Travelers Mutual Accident Ass'n*, 344 Mass. 71, 181 N.E.2d 594, 596 (1962) ("Knowledge of the existence of the disease on the part of the plaintiff was not required [to trigger coverage]; it was sufficient if the disease had in fact originated prior to the effective date of the policy." *Held*, disease had originated prior to coverage even though definitive medical diagnosis was not made until after policy was in force.); *Wilkins, supra;* Couch on Insurance, *supra*, at 639. *Cf. Cardamone v. Allstate Ins. Co.*, 49 Ill.App.3d 435, 7 Ill.Dec. 299, 364 N.E.2d 460, 462-63 (1977) (construing policy requiring that disease "first manifests itself" within a certain time to require symptoms to become manifest during that time, regardless of when diagnosis occurs).

We therefore hold that a disease "results" under the policies when it becomes clinically evident, that is, when

11. Although the 1972 letter signed by Eagle-Picher and Liberty Mutual refers to the date of medical diagnosis as the trigger of coverage, this extrinsic evidence cannot be used to modify unambiguous language in the absence of a finding by the district court that the letter constituted a binding modification or reformation of the prior policies. The parol evidence rule would seem to bar the use of the 1972 letter to modify the clear terms of integrated agreements *later* entered into. *See generally* Corbin, *supra*, § 573; Williston, *supra* § 631.

it becomes reasonably capable of medical diagnosis.[12] Accordingly, the judgment of the district court is modified to read:

> It is declared that the operative date for determining which of the several policies at issue here apply to a given claim or lawsuit in which damages are sought from plaintiff, Eagle-Picher Industries, Inc. is the date when the asbestos-related disease became reasonably capable of medical diagnosis.

As modified, the judgment below is affirmed.

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12. Eagle-Picher argues that a remand is appropriate to allow the district court to determine the extent of coverage once a policy is triggered. Under Eagle-Picher's proposed interpretation, "the insurer will pay all sums which the insured shall become obligated to pay because of all bodily injury to *all* claimants covered by the same accident or exposure to conditions, provided that the bodily injury of at least *one* claimant manifests itself during the policy period." (Emphasis in original.) It is not clear that this argument was ever raised before the district court. In any case, the proposal, though creative, is clearly without merit; the policies are geared to the injuries of a particular claimant, not to all claimants injured from the same exposure.

We have examined the remaining alleged errors, relating to discovery rulings by the district court, and have found no error of law or abuse of discretion.

UNITED STATES DISTRICT COURT,
D. MASSACHUSETTS.

Civ. A. No. 78-2739-Z.

EAGLE-PICHER INDUSTRIES, INC.

v.

LIBERTY MUTUAL INSURANCE COMPANY, American Motorists Insurance Company, Walbrook Insurance Company, Ltd., Winterthur Swiss Insurance Company, Southern American Insurance Company, Mutual Reinsurance Company, Ltd., St. Katherine Insurance Company, Ltd., London & Edinburgh General Insurance Company, Ltd., Bermuda Fire & Marine Insurance Company, Ltd., Dominion Insurance Company, Ltd., Yasuda Fire and Marine Insurance Company (U.K.), Ltd., Bellefonte Insurance Company, Turegum Insurance Company, Ltd., Mentor Insurance Company, (U.K.), Ltd., Assicurazioni Generali London, Stronghold Insurance Company, Ltd., Excess Insurance Company, London & Edinburgh Insurance Company, National Casualty Company of America, Ltd., Accident & Casualty Insurance Company, Argonaut Northwest Insurance Company, Slater, Walker Insurance Company, Ltd., John Basil Thomas Bird, a representative underwriter, and Philip Alan Froude, a representative underwriter.

Aug. 14, 1981.

MEMORANDUM OF DECISION

ZOBEL, *District Judge.*

This is a declaratory judgment action in which Eagle-Picher Industries, Inc. ("Eagle-Picher") requests a declara-

tion of the rights, liabilities and obligations of the parties to certain insurance contracts. The defendants are insurance companies which had provided Eagle-Picher with primary comprehensive general liability insurance and with first and second layer excess insurance during the years 1968-1979. The questions of interpretation arise because Eagle-Picher has been named as a defendant in approximately 5,500 lawsuits in which the plaintiffs allege that they contracted certain asbestos-related diseases as a result of contact with asbestos-containing products manufactured by Eagle-Picher between 1931 and 1971. The basic question the Court must determine is whether insurance coverage is triggered as of the time or times the claimant was exposed to the asbestos-containing product ("Exposure Theory"), or whether such coverage is triggered when the asbestos-related disease first manifests itself by discoverable and diagnosable signs or symptoms, typically as much as twenty years after the initial exposure ("Manifestation Theory"). Whichever insurance company was "on the risk" at what is determined to be the triggering time or times must provide coverage, including payment of damages and provision of legal defense. The Court's interpretation of the policies will determine which insurance company or companies, if any, must defend against and pay any damages for the increasingly numerous underlying claims against Eagle-Picher. Plaintiff, Liberty Mutual Insurance Company and certain companies and underwriters in the London Market, known in these proceedings as the Bird Defendants,[1] espouse

1. Walbrook Insurance Company, Ltd., Winterthur Swiss Insurance Company, Southern American Insurance Company, Mutual Reinsurance Company, Ltd., St. Katherine Insurance Company, Ltd., London & Edinburgh General Insurance Company, Ltd., Bermuda Fire and Marine Insurance Company (U.K.), Ltd., Dominion Insurance Company, Ltd., Yasuda Fire and Marine Insurance Company (U.K.), Ltd., Bellefonte Insurance Company,

the manifestation theory. American Motorists Insurance Company ("American Motorists") and certain other named members of the London Market, the so-called Froude Defendants [2], maintain that only policies in effect at the time of exposure provide coverage.

This opinion constitutes both Findings of Fact and Conclusions of Law.

Prior to 1968 Eagle-Picher was uninsured for the underlying asbestosis and related claims. From January 1968 through 1978 Liberty Mutual provided primary insurance with varying limits. From June 1973 to 1979 plaintiff was covered in addition by, first one and later two layers of excess insurance.

The coverage provided by each excess layer goes into effect only if the policy limits of the layer beneath become exhausted. This three-layer coverage was achieved through the issuance of many short-term policies, by each insurer, typically covering one year at a time. Appendix A provides a graphic representation of the coverages in effect during the relevant period.

In 1977 Liberty Mutual sent to Eagle-Picher a warning notice that the policy limits for 1974 and 1975 might be exhausted. Eagle-Picher forwarded this notice to American Motorist and the London Market. American Motorists acknowledged receipt of the notice but indicated disagreement with Liberty Mutual's assignment of

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1. (Cont'd.)

Mentor Insurance Company, (U.K.), Ltd., Assicurazioni Generali London, Stronghold Insurance Company, Ltd., London & Edinburgh Insurance Company, National Casualty Company of America, Ltd., Accident & Casualty Insurance Company, Argonaut Northwest Insurance Company, Slater, Walker Insurance Company, Ltd. and John Basil Thomas Bird, a representative underwriter.

2. Turegum Insurance Company, Ltd., Excess Insurance Company, and Philip Alan Froude, a representative underwriter.

claims to policy periods and its handling of claims under the manifestation theory. By letter dated October 13, 1977 a New York law firm acting for the entire London Market sent a reservation of rights letter to Eagle-Picher concerning the underlying claims. The reservation of rights is based on the issue whether liability is to be determined under the manifestation or exposure theory. A genuine controversy exists between the parties with regard to the defendants' duties and obligations under their respective policies in connection with the underlying asbestos related claims.

All defendants with interests adverse to those of Eagle-Picher are citizens of states or countries other than Ohio, the state of incorporation of Eagle-Picher and the state where its principal place of business is located.

The insurance policies at issue all contain "coverage" clauses defining in general terms the scope of the coverage. In addition, the policies provide definitions of relevant terms. All are "occurrence-based", that is, coverage is provided for personal injury caused by an "occurrence" during the policy period. The policies, while quite similar, contain minor variations in language and punctuation which do not, however, affect the determination of the question presented so as to produce different results for different insurers. Before analyzing the policies, it is useful to lay out the relevant language.

1. Between January 1, 1968 and January 1, 1978, Liberty Mutual provided the plaintiff with primary comprehensive general liability insurance. The fourteen separate policies contain no more than two variations of each relevant clause. With respect to coverage, one variation, found primarily in policies written during the early years, provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated

> to pay as damages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence . . .

The second variation, found in policies covering January 1, 1976 to January 1, 1978, provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury due to asbestos exposure caused by an occurrence if the bodily injury is included within the products hazard . . .

The policies include two slightly different definitions of relevant terms. The first provides:

> *Bodily injury* means bodily injury, sickness or disease sustained by any person.
>
> *Occurrence* means an accident, including continuous and repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

The second provides:

> *Bodily injury* means bodily injury, sickness or disease sustained by any person, which occurs during the policy period, including death at any time resulting therefrom.
>
> *Occurrence* means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured.

2. From June 1, 1973 to October 1975 American Motorists provided the plaintiff with a first layer excess umbrella policy, containing the following coverage clause:

> The Company agrees to indemnify the insured for all sums which the insured shall become obligated to pay as damages, by reason of liability . . . because of personal injury . . . caused by or arising out of an occurrence which takes place during the policy period anywhere in the world.
>
> The policy also contains the following definitions:
>
> *Personal injury* means (a) bodily injury, shock, sickness or disease (including death, mental anguish, and mental injury resulting therefrom); . . .
>
> *Occurrence* means an accident, or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury, . . . property damage or advertising liability neither expected nor intended from the standpoint of the insured. . . .

3. From October 10, 1975 through January 1, 1979 the so-called London Market provided plaintiff with first layer excess umbrella insurance, replacing American Motorists. The "London Market" is a group of insurance underwriters, each of whom underwrites a stated percentage of the total coverage provided by a single policy. The "coverage clause" of the London Market policy provides:

> Underwriters hereby agree . . . to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability . . . imposed upon the Assured by law . . . for damages on account of: Personal Injuries . . . caused by or arising out of each occurrence happening anywhere in the world. . . .
>
> The policy also contains the following definitions:
>
> The term *personal injuries* wherever used herein means bodily injury (including death at any time re-

sulting therefrom,) mental injury, mental anguish, shock, sickness, disease, disability. . . .

The term *occurrence* wherever used herein shall mean an accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises shall be deemed one occurrence.

4. The London Market also provided plaintiff with second layer excess umbrella coverage from September 1, 1973 to January 1, 1979. These second layer policies contain no independent coverage clauses or definitions; instead, they incorporate by reference the terms of the underlying policy. Each policy contains a clause providing for payment of damages "caused by or arising out of each occurrence . . . arising out of the hazards covered by and defined in the underlying umbrella policies. . . ." Thus, between September 1, 1973 and October 10, 1975, the London Market second layer policies provided coverage in accordance with the terms of the underlying American Motorists first layer policy; from October 10, 1975 to January 1, 1979 the London Market second layer policies provided coverage as defined by the London Market's own first layer policies.

All parties to this dispute agree that the relevant policy language is clear and unambiguous. They disagree as to the meaning of the unambiguous language and the Court received certain medical evidence in aid of interpretation.

The coverage clauses, except that in the American Motorists policies, provide indemnity for all sums for which the insured shall become legally obligated to pay

[liability imposed by law] for "damages because [by reason or on account] of . . . bodily [personal] injury . . . caused by [or arising out of] an occurrence . . ." American Motorists differ in that they agree to indemnify with respect to "an occurrence during the policy period."

The terms used in the policy are terms of art. Both "personal" or "bodily injury" and "occurrence" are defined in each policy. Each term of art is linked to the next by the use of causal connectors such as "by reason of" "because of" and "caused by or arising out of." Liability is "caused" by injury, and injury in turn is "caused" by an occurrence. This construction implies that liability, injury, and occurrence, while necessarily connected, are nevertheless distinguishable. It means further that each element is expected to occur separately in time.

All policies except the later group of those written by Liberty Mutual define occurrence as "an accident or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury . . ." This definition is broad and inclusive. Each "occurrence" is made up of two components, initial exposure or accident and resulting injury; neither one without the other would be sufficient. There can be no question but that the aspect of the occurrence which must take place within the policy period, however, is the "result", that is, the time when the accident or injurious exposure produces personal injury. The time-limiting phrase "during the policy period" always follows the word "results" and frequently is set off by commas, so that it can modify only the preceding verb "results". Thus, the definitional language explicitly focuses on the result rather than the cause as the component to which coverage is linked. This is equally true of the American Motorists policies. Even though their coverage clauses refer to "occurrence during the policy period," their definition of occurence also links the result-

ing injury, not the exposure to conditions, to the policy period.[3]

The next question to be determined is what the policies mean by "personal" or "bodily injury" given the diseases which gave rise to the underlying claims. The exposure proponents maintain that "personal injury," within the meaning of these policies, occurs when the first sub-clinical cellular changes take place within the lung. They argue that asbestosis is not a disease at all, but a lengthy injurious process which begins with a series of minute but definite "insults" to the lungs. These insults comprise a succession of separate, compensable personal injuries, each of which, they say, meets the policy's requirement of resulting injury.

The manifestation proponents, on the other hand, contend that with respect to asbestosis, mesothelioma and broncogenic carcinoma, the policy term "personal injury"

3. Recently, in *Am. Motorists Ins. v. E.R. Squibb & Sons*, 95 Misc.2d 222, 406 N.Y.S.2d 658 (1978) the Supreme Court for New York County adopted the manifestation rule in construing, with respect to claims for cervical cancer caused by the drug DES, an American Motorists policy which provided coverage for an "accident or injurious exposure to conditions which results, during the policy period, in bodily injury. . . ." In *Squibb*, the exposure to the drug occurred in 1952, 1953 and 1961, while the disease only became manifest in 1970, 1971 and 1975, in the daughters of mothers who had ingested the drug. The Court found that "the policy language does not limit coverage to incidents of exposure during the policy period, but rather to conditions which result in bodily injury during the policy period. A reading of the policy language would appear to indicate that coverage is predicated not on the act which might give rise to ultimate liability, but on the result. It would be a strained interpretation to construe the occurrence clause as though it covered "exposure during the policy period which results in bodily injury." It is the result which is keyed to the policy period, and not the accident or exposure." *Id.* 406 N.Y.S.2d 658 at 659-660.

refers neither to a lengthy process, nor to a series of microscopic "insults", but to clinically evident, diagnosable disease. In the case of asbestosis, they argue, the "result" does not occur until the accumulated depositioning of asbestos fibers in the lung, with its attendant secretion of destructive enzymes, produces such significant interference with lung function that the victim suffers perceptible, measurable symptoms.

The exposure proponents bolster their arguments with sophisticated medical analyses of the fibrosing process from the time of exposure to the time of disability or death; in fact, an appreciation of these medical details is necessary in order to understand the exposure proponents' concept of minute "insults" to the lung. The manifestation proponents, in contrast, argue that the policy terms must be analyzed from a layman's point of view. When this approach is taken, they say, no medical evidence is necessary; instead, the Court need only look to the common and everyday meaning of terms such as "disease" and "injury", in order to conclude that exposure results in injury when it manifests itself through clinically evident disease.

Because these questions were unresolved at the time of trial, and to aid in interpretation of the relevant language the Court received expert medical testimony from Dr. Bernard Gee, a research scientist and clinician with vast experience in the area of asbestos-related disease, and from Dr. Edward Burger, a researcher and administrator whose testimony was based on a review of current literature in the field and not particularly helpful. With minor exceptions, however, the testimony of the experts was not inconsistent. After careful consideration of that medical evidence, the insurance policy language, and the common meaning of the terms employed therein, I find

that exposure to asbestos does not "result" in "personal injury" so as to trigger insurance coverage until such time as the accumulation of asbestos fibers in the lungs produce signs and symptoms capable of diagnosis as an asbestos-related "disease," in the commonly understood meaning of the term "disease." This finding is based on several considerations.

First, the testimony of both experts contradicted the central contention of the exposure theory that exposure and injury occur either simultaneously, or so nearly so that coverage for injury can most reasonably be linked to the time of exposure. The testimony of the exposure proponents' own expert, Dr. Gee, made it clear not only that exposure to asbestos typically does not produce clinically evident disease for as much as twenty years, but also that the sub-clinical injuries to the lung produced early in the destructive process do not occur simultaneously with the exposure. Before even sub-clinical injury can occur, the asbestos fiber must pass a number of dichotomously branching tubes in the nose and throat which get progressively narrower, must reach the lung and become depositioned there, and must be enveloped by a scavenger cell, an alveolar macrophage which may then begin to produce destructive enzymes in a futile attempt to destroy the indestructible asbestos fiber. Because the fiber is not biodegradable, the macrophage continues to secrete enzymes which eventually destroy surrounding tissue and produce scarring. These tiny lung scars are the "insults" to which the exposure proponents refer. Along the way, nearly all fibers are removed, either through expectoration, by means of the physiological filters in the nose and throat, through being carried back up and out by the mucociliary escalator, or sometimes by being taken away by an alveolar macrophage through the lymphatic system or the

mucociliary escalator.[4] Moreover, even when the fiber has become embedded in the lung and the scarring process has begun, the end result, that is, disabling disease or death, is by no means inevitable. In fact, Dr. Gee testified that over 90% of all urban city dwellers have some asbestos-related scarring, but only a tiny percentage of those exposed will ever develop clinical asbestosis. In short, exposure to asbestos does not produce instantaneous subclinical cellular changes; some amount of time necessarily passes before any destructive process begins. Also, there is no inevitability to the process—it may simply stop at any point along the way without ever producing clinically evident disease. This being so, to characterize as injury the minimal changes which occur in some people some time after exposure is not a supportable use of the word "injury" in the context of a liability insurance policy.

To say that exposure to asbestos results immediately in personal injury, is unreasonable for another reason. It is a basic tenet of insurance law that unambiguous contract terms are to be given their common, popular and ordinary meaning, 13 J. Appleman Insurance Law and Practice § 7384 (rev. ed. 1976), 43 Am.Jur.2d Insurance, § 256.[5] Unless the insurance contract explicitly draws upon a technical or scientific meaning of a term, shared by both parties, the Court is to apply the meaning which a non-specialist would understand. *Lincoln Nat. Life Ins.*

4. It is possible that such removal by a macrophage may, however, occur after insult to the alveolar region of the lung from secretion of enzymes by the same macrophage.

5. The parties raised before trial the question whether the law of Ohio, of Illinois, or of England should control the interpretation of the insurance contracts at issue here. I find that there is no true conflict among all potentially applicable laws, and therefore I do not reach the question of which state law would be applied to these contracts. *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608, 612 (9th Cir. 1975).

Co. v. Erickson, 42 F.2d 997, 1001 (8th Cir. 1930); *Reiser v. Metropolitan Life Ins. Co.*, 28 N.Y.S.2d 283, 262 App. Div. 171 (1941) *aff'd.* 289 N.Y. 561, 43 N.E.2d 534 (1942). In this case, while Eagle-Picher, a large manufacturer, might be expected to have technical knowledge relating to its products and enterprises, it cannot be assumed to have had sophisticated medical knowledge of the biochemical details of the asbestosis process,[6] or to have intended that any abstruse or unusual meanings be given to the terms in its product liability insurance policies. Where there is a conflict between a technical or medical definition and the meaning an average person would apply to an insurance term, the court will accept and apply the layman's viewpoint. *Irelan v. Standard Mutual Assoc.*, Mo.App., 379 S.W.2d 815 (1964). As a result, the Court must interpret the policy from the point of view of the layman.

The policies define personal injury or bodily injury in lay terms, "bodily injury, shock, sickness or disease (including death, mental anguish and mental injury resulting therefrom.)" The exposure proponents assert that asbestosis is a process, not a disease, and that coverage should be provided for a series of minute personal or bodily insults to the lung. The manifestation proponents point out that all of the underlying claims against Eagle-Picher allege fully manifested asbestos-related diseases, not subclinical cellular injuries, and they argue that to a layperson, asbestosis or asbestos-related injury means symptomatic diagnosable disease, regardless of what the terms might mean to a research scientist.

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6. Dr. Gee agreed that his work is on the cutting edge of one area of the developing science in this field, that indeed, only within the last five to eight years has attention in the field focussed on biochemical cellular changes rather than microscopy and morphology. His testimony is in large part based on that new focus.

Dr. Gee, who is also a clinician with vast treatment experience, proffered his own definition of "asbestosis" as an injury mechanism which is present soon after the first asbestos fiber is embedded in the lung, but went on to distinguish between his specialized meaning of the word in the context of research and the meaning he would give the word as a treating physician. According to Dr. Gee, "when a patient asks 'Do I have asbestosis?' He means: Do I have clinically evident disease by your methods, including my own perceptions, that is, the patient's, ... He doesn't mean: Do I have some injury mechanism going on." Dr. Gee drew the same distinction again when he said, with reference to a patient's history of exposure to asbestos, and the presence of asbestos in his lung, "If I find asbestos, I cannot conclude without other evidence that there is clinical disease. I can conclude that there is an injury mechanism set in motion." That testimony, combined with the ordinary meaning of the coverage language, leads to the conclusion that exposure to asbestos results in "personal injury" when it produces clinically evident diagnosable disease, that is, when it becomes manifest. Although the injurious process begins many years prior to the eventual manifestation of clinical asbestosis, the phrase "results in personal injury" cannot, absent the application of a hypertechnical definition of the words, refer to the earliest sub-clinical cellular damages, but must refer, to the time when the individual has clinically evident disease.

The scope of the Court's analysis so far has been limited to an examination of the text of the policies and to a review of the relevant medical testimony. However, because other courts have come to different conclusions and because the rules of construction governing the interpretation of insurance contracts explicitly serve certain

public policy goals, it is appropriate to assess the manifestation theory in a broader context.

The Sixth Circuit, in a recent decision, affirmed the District Court's adoption of the exposure theory.[7] It nevertheless concluded that it was "bound to broadly construe the insurance policies to promote coverage." *Ins. Co. America v. Forty-Eight Insulations*, 633 F.2d 1212, 1219 (6th Cir. 1980)—(hereafter "Forty-Eight"). The underlying facts of the *Forty-Eight* case are, from a public policy point of view, substantially different from those at issue here. In that case, Forty-Eight had purchased liability insurance as far back as 1955, but its coverage starting in 1976 contained such a large per person deductible for asbestos cases that the court found that "as a practical matter, Forty-Eight is uninsured for asbestosis occurring after 1976." *Forty-Eight, supra*, at 1216 n.6. This consideration led the Court to reject as not controlling precedents in the area of health insurance which it found to be "most relevan[t]."[8] Although the Court acknowleged that

7. The *Forty-Eight* opinion was recently adopted both as to "reasoning and result" by the Fifth Circuit, in *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir. 1981). See also, *Keene Corporation v. Ins. Co. of No. Amer.*, 513 F.Supp. 47 (D.C. D.C. 1981).

8. The cases cited by the Sixth Circuit are part of a line of cases which, interpreting clauses in insurance policies which exclude from coverage any sickness or diseases originating and commencing prior to the issuance of the policy, nevertheless find in favor of coverage where the disease becomes manifest during the policy period, although the medical cause clearly existed prior to manifestation. See, e. g. *Royal Family Ins. Co. v. Grimes*, 42 Ala.App. 481, 168 So.2d 262 (1964); *Reiser v. Metropolitan Life Ins. Co.*, 262 App.Div. 171, 28 N.Y.S.2d 283 (1941) *aff'd.* 289 N.Y. 561, 43 N.E.2d 534 (1942) (Presence of calcium deposits which might never have become a source of physical disturbance not a disease until manifest. The meaning of the agreement must not be that of the scientist but that of the average person.); *Metropolitan Life Ins. Co. v. Reynolds*, 48 Ariz. 205, 60 P.2d 1070 (1936) ("De-

these cases appeared to support the manifestation theory, it nevertheless held that they in fact supported the exposure theory because "the health insurance cases rely on the same rules of construction that we think are applicable here: insurance policies must be strictly construed in favor of the injured and to promote coverage; similarly a policy must be construed to favor the legitimate expectations of the parties." *Forty-Eight, supra,* at 1221. The Court went on to conclude:

> In this case, we are faced with two possible constructions, one of which is likely to leave the manufacturer insured, the other of which leaves the manufacturer uninsured for all practical purposes. We think that Illinois and New Jersey courts [the states whose law was arguably applicable to the insurance contracts] would try to construe the contract language to embrace the exposure theory. *Forty-Eight, supra,* at 1222.[9]

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8. (Cont'd.)

fendant is liable, though the medical cause of the disease existed prior to the policy, if the disease or sickness does not manifest itself until afterwards. So the ordinary man wanting health protection would understand it." 60 P.2d at 1073); *Fuller v. Aetna Life Ins. Co.,* 259 F.2d 402 (5th Cir. 1958); 10 Couch on Insurance 2d § 41.814 at 639.

9. The *Forty-Eight* decision appears to rest primarily on considerations of policy and result. However, insofar as it is based on review and interpretation of the medical evidence relating to asbestosis, it rests on findings with which I am not in agreement. The Sixth Circuit accepted the notion that every "insult" to tissue in the lungs constitutes "bodily injury" within the meaning of the applicable insurance policies. My review of the medical evidence persuades me that these sub-clinical changes, only recently identified by the most sophisticated medical research techniques, constitute neither "bodily injury" nor "disease" within the common and ordinary meaning of these terms.

In the present case, the Court is similarly faced with one construction which would provide coverage, and another which leaves Eagle-Picher uninsured. Here however, it is the manifestation theory which is like [sic] to maximize the coverage provided to Eagle-Picher in the underlying lawsuits. As the earlier discussion demonstrates, this court's adoption of the manifestation theory is grounded on a finding that the relevant text of the insurance policies, as explained by the medical evidence dictates manifestation. An additional strand of support for this conclusion, however, is provided by the fact that application of general rules of insurance policy construction, with their public policy underpinnings, produces the same result.

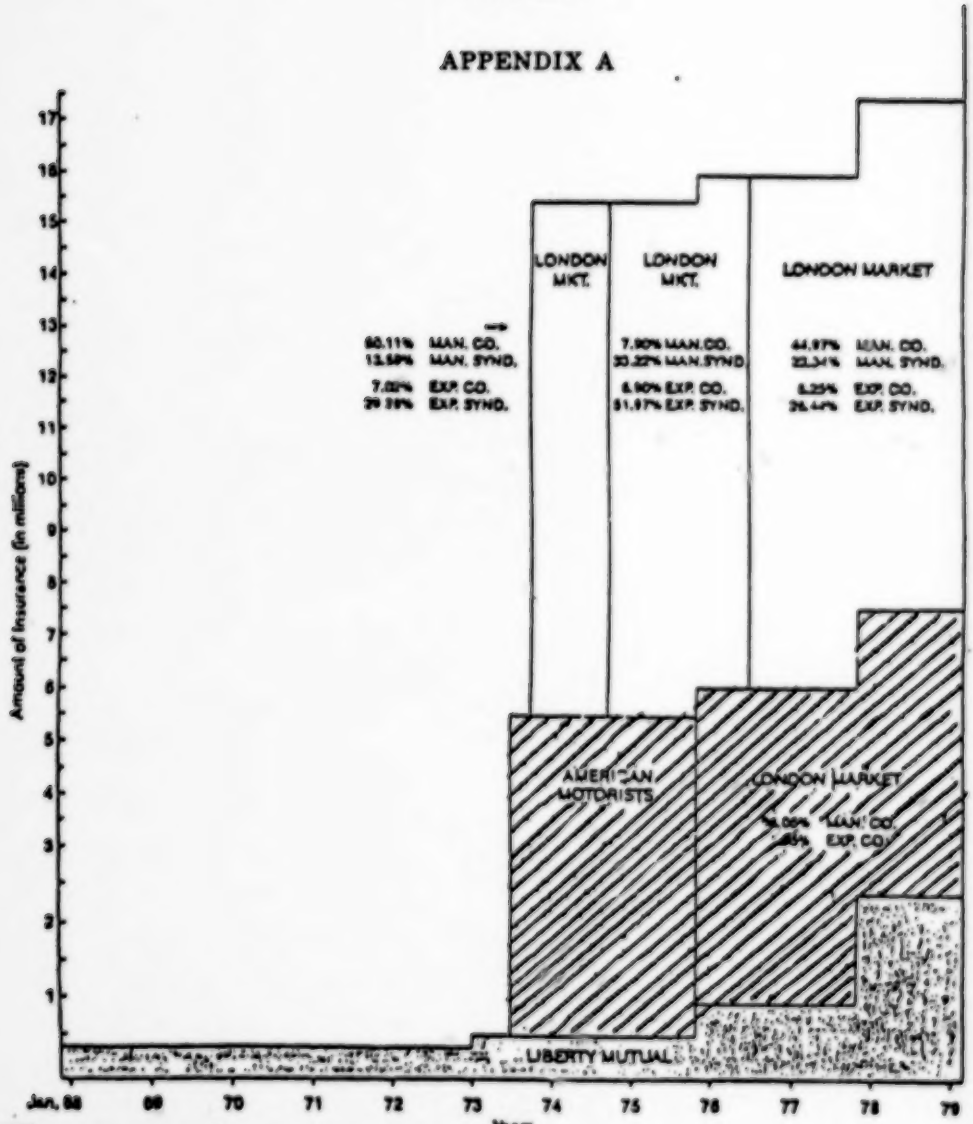
The facts of this case also indicate that manifestation most closely approximates the expectations of the contracting parties. As noted above, Eagle-Picher was uninsured during most of the thirty years up to 1971 during which it manufactured asbestos. Only in 1968 did Eagle-Picher first purchase general liability coverage. During the years after 1971, when Eagle-Picher ceased to produce asbestos-containing materials, it nevertheless continued to purchase, and in increasing amounts, insurance coverage for damages due to injury caused by asbestos exposure [See App. A]. Although there was scant possibility that claims based on further exposure to asbestos would be made, it could certainly be predicted that increasingly numerous manifestations of asbestos-related diseases would occur, giving rise to increasingly numerous claims against Eagle-Picher. The fact that Eagle-Picher bought substantial amounts of insurance explicitly keyed to damages due to asbestos exposure during a period when no such exposures were taking place lends yet further support to the conclusion that the expectation of the contracting parties was that coverage would be provided on a manifestation, rather than an exposure, basis.

Having found in favor of manifestation, a workable definition of the term "manifestation" remains to be delineated. The parties have proferred several possibilities. These include the date on which an asbestosis victim "knows or has reason to know" he has the disease, the date on which a victim's symptoms become "capable of medical diagnosis," the date of actual diagnosis, or the date of death. Because of the thousands of underlying lawsuits against plaintiff, each seeking damages for asbestos-related disease, the policies in issue must be interpreted not only to reflect the manifestation concept, but also to ensure that coverage is certain, and the availability of coverage is easily ascertained and easily demonstrated. I conclude that with respect to all claims under the insurance policies at issue in this case, coverage shall be provided when the asbestos-related disease becomes manifest, as measured by the date of actual diagnosis or, with respect to those cases in which no diagnosis was made prior to death, the date of death. This holding does not require pro rata sharing or apportionment of damages on account of Eagle-Picher's liability for asbestos-related claims.

Judgment shall enter in accordance with this opinion.

AMOUNT OF INSURANCE
INSURERS

APPENDIX A



□ - second layer excess
▨ - first layer excess
■ - primary

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—LAW DIVISION

No. 78 L 8760

ZURICH INSURANCE COMPANY, et al,
Plaintiff

—vs—

RAYBESTOS, et al
Defendant

OPINION

Plaintiff, Zurich Insurance Company, filed this declaratory judgment action seeking a determination as to the respective rights and duties of the parties under various comprehensive general liability policies issued by the parties to Raybestos-Manhatten during the years 1951 through 1981. Specifically, Zurich asks this court to declare when the duty to defend and indemnify asbestos-related cl ims arises under the insurance policies issued to the insured.

The parties in this case, besides Zurich and Raybestos-Manhatten, are Federal Insurance Company, which insured Raybestos from September 26, 1951, to September 26, 1967, and Commercial Union Insurance Company, which insured Raybestos from September 26, 1967 to October 15, 1969. Since 1969, Raybestos has been insured by Zurich. Northbrook Excess & Surplus Insurance Com-

pany has intervened as a plaintiff in this case based on policies of excess insurance which it has issued to Raybestos since 1976.

The matter is currently before this Court on plaintiff's motion for summary judgment. Plaintiff Zurich represents that there are presently pending in various courts throughout the United States over 9,000 lawsuits in which Raybestos is alleged to be liable for personal injuries and deaths claimed to result from exposure to Asbestos-containing products allegedly sold and manufactured by Raybestos. Zurick [sic] anticipates that similar actions will be filed against Raybestos in the future. To date, the defense of the vast majority of these claims has been assumed by Zurich. Both Federal and Commercial have refused to undertake the defense and coverage of most of these claims.

Plaintiff's motion for summary judgment rests upon the theory that the policies issued to Raybestos are occurrence policies, providing coverage for damages arising out of bodily injuries which occur during the policy period. According to Zurich, in asbestos related claims, bodily injury occurs upon exposure and continues to occur upon each exposure to the asbestos products of the insured. Consequently, since coverage is triggered by bodily injury and since bodily injury takes place upon exposure, Zurich maintains that coverage of these claims should be handled by the insurer (or insurers) whose policy covers the exposure period. In support of its position, Plaintiff points to two recent cases which have adopted this so-called "exposure theory" *I.N.A. v. Forty-Eight Insulations*, 451 F. Supp. 1230(E.D. Mich. 1978), *aff'd* 633 F2d 1212 (1980); *Porter v. American Optical*, 641 F.2d 1128 (5th Cir. 1981). Based on these cases, Zurich maintains that there is "universal medical agreement" that bodily injury in asbestos cases occurs at or near the inhalation of

asbestos fibers. Accordingly, Plaintiff states that there is no genuine issue of material fact and asks that this Court enter summary judgment in favor of the exposure theory of coverage.

Needless to say, Defendants Federal and Commercial Union oppose the plaintiff's motion for summary judgment. Generally, the parties allege that numerous questions of material fact exist which preclude the entry of summary judgment in Zurich's favor. Specifically, defendants assert that there are questions of fact as to which state law should apply to interpret the contracts of insurance, questions with respect to the existence, terms and conditions of the insurance policies issued to Raybestos, and an issue of fact with respect to the etiology of asbestos related diseases.

With respect to this latter issue, defendant, Commercial Union, attached to its memorandum affidavits of two medical doctors which state that asbestos-related diseases occur at some definite point in time and not merely upon the inhalation of one or more asbestos fibers. The affidavits also state that while the inhalation of an asbestos fiber produces a biological or cellular response, that response is not synonymous with bodily injury as the term is ordinarily used by the medical profession. Commercial Union contends that these affidavits contradict the facts proposed by Zurich and that this factual conflict precludes the entry of summary judgment.

Defendants further argue that the exposure theory advanced by Zurich is erroneous as a matter of law. The policies involved in this case are liability policies which obligate the insurers only where there has been actual damage or compensable injury during the policy period. Thus, under the policies, the duty to defend and indemnify does not arise until the occurrence insured against has manifested itself. This approach has been labeled the

"manifestation theory". Defendants state that contrary to the exposure theory which rests upon complex medical testimony, the manifestation approach is consistent with an interpretation of the contracts according to their plain and ordinary meaning.

Raybestos-Manhatten, the insured, initially filed a memorandum in support of Zurich's motion for summary judgment. Subsequently, Raybestos withdrew that support in light of the U. S. Court of Appeals for the D. C. Circuit's opinion in *Keene Co. of North America vs. Aetna Casualty and Surety Co.*, 667 F2d 1034, (D. C. Cir. 1981) Cert denied, 50 U.S.L.W. 3716 (1982). Raybestos submits that the court in *Keene* reached the correct decision in holding that an insurer's liability under a policy is triggered by injury, and that such injury occurs from first inhalation through exposure in residence, until manifestation. Moreover, each insurance company whose policy is triggered is liable in full for the policyholder's liability and defense costs, with the provision that when more than one policy applies to a claim, the insurance companies may apportion the amounts among themselves pursuant to the "other insurance" clauses in their policies. Raybestos asks that this court adopt the findings of *Keene*, or at the very least, deny summary judgment without prejudice so that Raybestos may have an opportunity to adduce and present evidence which will demonstrate that the Court, in *Keene*, reached the correct result.

While this introduction does not begin to do justice to the fine legal arguments and analyses proffered by the parties in their briefs and oral arguments, it is sufficient to bring into focus the issues which face this court.

The first issue which needs to be addressed is defendant Federal's argument that there is no justiciable controversy before this court. Federal asserts that Zurich must raise insurance coverage issues within the context

of particular facts of an underlying claim against the insured, and that any party with an interest in the subject matter of this litigation must be joined as a necessary party. This Court does not agree.

The Illinois Declaratory Judgment Act, *Ill. Rev. Stat.* Ch. 110, § 57.1 (1976), provides that:

> ". . . the Court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgment, whether or not any consequential relief is or could be claimed, including the determination . . . of the construction of any . . . contract or other written instrument, and a declaration of the rights of the parties interested . . ."

Illinois courts have consistently held that the remedy of declaratory judgment should be liberally applied and not restricted by unduly technical interpretations. *Illinois Gamefowl Breeders Ass'n. v. Block*, 75 Ill. 2d 443, 389, N.E.2d 529 (1979); *Crest Commercial Inc., vs. Union-Hall, Inc.*, 104 Ill.App.2d 110, 243 N.E.2d 652 (1968). The courts have been strict, however, in requiring that there be an actual controversy and that the party bringing the action have an interest in the litigation. *Miller v. Cty. of Lake*, 79 Ill.2d 481, 404 N.E.2d 222 (1980).

In explaining what is contemplated by the requirement of an 'actual controversy', the Supreme Court has stated:

> "'"Actual in this context does not mean that a wrong must have been committed and injury inflicted. Rather, it requires a showing that the underlying facts and issues of the case are not moot or premature, so as to require the court to pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events. [Cita-

> tions] The case must, therefore, present a concrete dispute admitting of an immediate and definite determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof. [Citations.]" (*Howlett v. Scott* (1977) 69 Ill.2d 135, 141-42, 13 Ill.Dec. 9, 11, 370 N.E.2d 1036, 1038; quoting, *Underground Contractors Association v. City of Chicago* (1977) 66 Ill.2d 371, 375, 5 Ill. Dec. 827, 362 N.E.2d 298).

It is this court's opinion that plaintiff's action presents such a concrete dispute. The issues in this case are basically questions of contract interpretation. Each of the insurers insured Raybestos under a comprehensive general liability policy. The language of these policies, although varying slightly, provide that the insurer is obligated to indemnify and defend when bodily injury occurs during the policy period. The insurers do not agree as to the definition of bodily injury or occurrence. As stated previously, Zurich maintains that bodily injury occurs at exposure, thereby triggering coverage under any policy in effect during the exposure period;while Defendants, Federal and Commercial, claim that coverage is not triggered until the bodily injury has manifested itself in some concrete fashion.

That this dispute presents a substantial controversy of sufficient immediacy is evidenced by the fact that, as of the date of this lawsuit, Zurich has handled, under a reservation of rights, over 90% of the over 9,000 asbestos-related claims filed against Raybestos. In filing this action, Zurich seeks a declaration as to the proper interpretation of the policies issued to Raybestos as they apply to asbestos claims. The meaning of this policy language is a question which is relevant to each asbestos lawsuit which has been or will be filed. This court can resolve the dis-

pute as to what constitutes bodily injury by looking to the policies and the facts relating to the particular types of diseases whose coverage is at issue. Whatever decision this court ultimately renders can be made without specific reference to the individual cases and claimants involved in the underlying actions.

The Court has read the cases cited by Federal in support of its arguments, and with all due respect to those courts' opinions, this court must disagree with their result. This is precisely the kind of case where use of the declaratory judgment remedy is most appropriate. *See*: *Crown Cork & Seal -vs- Aetna, et al,* Court No. 1292 (Pa. Ct. Common Pleas,Oct.9,1980) *Keene v. INA, supra.*

It is clear that construction of a clause in an insurance policy is the proper subject of a declaration of rights in a declaratory judgment action. *St. Farm Fire & Casualty Co. v. Moore,* 103 Ill. App.3d 250 (1981). The fact that the controversy here is between insurers rather than an insurer and its insured, does not alter the result. The parties have done a capable and conscientious job of presenting the court with their interpretations of the contract language. By deciding the issue of what constitutes 'bodily injury' within the context of this case, the problem of litigating the question in each lawsuit, possibly with conflicting outcomes, can be avoided. For these reasons, the court concludes that this case presents a justiciable controversy suitable for declaratory judgment.

We now turn to the primary issue before this court, namely, whether this case in its present stage can appropriately be decided on a summary judgment motion. As the parties are well aware, the purpose of a summary judgment procedure is to determine whether there exists a genuine issue of material fact; if there is no such issue and the moving party is entitled to judgment as a matter of law, the summary judgment must be granted; if there is

such an issue of fact, summary judgment must be denied. *Murphy v. Urso*, 88 Ill.2d 444 (1982). Any affidavits, depositions, or pleadings on file are to be construed against the moving party. Because summary judgment is such a drastic method of disposing of a case, it should not be employed unless the right of the moving party is free from doubt. *Marciniak v. O'Connor*, 102 Ill. App.3d 381 (1981).

In this case,granting plaintiff's motion for summary judgment at this stage of the proceedings would be inappropriate. There is a question of fact as to what constitutes bodily injury under the terms of the policies.

There is, however, no issue of fact as to which state law should apply. Although defendants attempt to raise such an issue by arguing that the law governing this action has not been determined, they do not specifically argue that Illinois law does not apply, nor do they suggest that there are any substantive differences between Illinois law and the laws of New Jersey or Massachusetts. In the absence of any such allegations, the court can assume that the law of any relevant state is consistent with the law of Illinois, and can apply Illinois law. *See*: *Porter v. American Optical Corp.*, 641 F.2d at 1145.

Under Illinois law, insurance policies are deemed to be contracts. In order to give effect to the intent of the parties, policies are to be construed as other contracts are construed. Insurance policies should be read as a whole, giving effect to every part, as far as it is possible. Where language in a policy is clear and unambiguous, it must be taken in its plain, ordinary and popular sense. *Economy Fire & Casualty Co. v. Pearce*, 79 Ill.App.3d 559 (1980); *Hartford Accident & Indemnity Company v. Case Foundation*, 10 Ill. App.3d 115 (1973). Moreover, as a general rule, since construction of an insurance policy presents

only a question of law, it is an appropriate issue for determination by means of summary judgment. *State Farm Mutual Auto Insurance Co. v. Schmitt*, 94 Ill.App.3d 601 (1981).

This court's starting point must, therefore, be the insurance policies themselves. Unfortunately, the policy language of the policies which are before the court do not answer, unambiguously, the question of whether "exposure" or "manifestation" should trigger coverage. Generally, the policies provide that "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . caused by an occurrence." Bodily injury is defined as bodily injury, sickness or disease which occurs during the policy period, and occurrence means an accident, including injurious exposure to conditions, which results in bodily injury neither expected nor intended from the standpoint of the insured. Both plaintiff and defendants argue that the plain ordinary and popular sense of the terms support their position.

Defendants maintain that in giving these policy terms their plain and ordinary meaning it becomes clear that bodily injury denotes overt damage which is manifested in pain, disfigurement or functional impairment. Commercial Union contends that under its policies, it is not liable unless a claimant's cause of action "ripens" or "accrues" or "occurs" during its policy period. Both Federal and Commercial argue that Zurich's theory rests upon medical technicalities which were not contemplated by the parties when the policies were drafted. They cite numerous cases in which courts have distinguished between "injury" and "disease" and have held that manifestation of symptoms signifies the occurrence of disease for purposes of coverage under liability insurance policies. (*See: Craig v. Central National Life Insurance*, 16 Ill. Appl 2d 344 (1958);

Morrisy v. Eli Lilly & Co., 76 Ill.App.3d 753 (1979); *Brociolo v. Horace Mann Mutual Casualty Co.*, 37 Ill. App.2d 493 (1962); *Canadian Radium and Uranium Corp. vs. Indemnity Insurance Co. of North America*, 411 Ill. 325 (1952).

While defendants raise solid arguments to support their theory, this court is not convinced that the plain and ordinary meaning of the terms supports manifestation. We are dealing here with unique diseases. Asbestos, mesotheliomia and lung cancer are cumulative, progressive diseases with latency periods of at least twenty years. These are not the kinds of diseases which policies typically cover. Therefore, the cases cited by defendants dealing with health insurance, statutes of limitations and radiation poisoning, are not really relevant. As the court in *INA v. Forty-Eight Insulations*, noted: "There is usually little dispute as to when an injury occurs when dealing with a common disease or accident. As can be seen, in this case, there is considerable dispute as to when an injury from asbestosis can be deemed to occur." *INA* at 1222.

It is also clear from the policies that "bodily injury" is defined as "bodily injury, sickness *or* disease"; those three terms being separate and distinct. Therefore, the defendants [sic] attempt to equate injury with disease and then argue that asbestos-related diseases do not occur until they manifest themselves, must fail.

It is not so easy to dismiss defendants' argument that plaintiff's theory goes beyond the plain and ordinary sense of the terms by requiring the court to consider medical technicalities.

However, in this case, the court believes that the lack of specificity in the policies coupled with the nature of asbestos-related diseases necessitates that we look beyond the policies to consider medical evidence. Zurich relies solely on the cases of *INA* and *Porter* for the prin-

ciple that some type of bodily injury occurs upon each inhalation or ingestion of asbestos fibers. While this court agrees with plaintiff that *INA* and *Porter* are well reasoned and persuasive opinions, it recognizes that the courts' conclusions were based in large part on medical testimony which was presented during extensive hearings. Indeed, in the *INA* opinion (which was followed by the 5th Circuit with *Porter*), the Court stated that:

> "The medical evidence is uncontroverted that 'bodily injury' in the form of tissue damage takes place at or shortly after the initial inhalation of asbestos fibers. Thus, it required only a straightforward interpretation of the policy language for us to adopt the exposure theory."
>
> *INA*, 133 F.2d at 1222.

Here, there is no medical testimony before the court. Federal, Commercial and Raysbestos should be given the opportunity to present evidence on whether inhalation causes immediate injury. They should not be bound by the insuer's concession in *INA* that tissue damage takes place shortly after inhalation. (*INA*, at 1218). According to defendants' briefs, the medical evidence on this point is conflicting. Defendants must be given a chance to litigate this material fact. Therefore, this Court is reserving its ruling on the various theories of coverage until such time as it has heard the testimony and evidence of the parties.

In conclusion, this court wants the parties to know that it appreciates their fine efforts and patience. The importance of this question to the insurance industry, the asbestos manufacturers and to the thousands of claimants and their families who have suffered with asbestos-related diseases, is not lost on the court. Many solutions, includ-

ing a federal compensation system have been proposed to deal with the problem. No solution is without fault. Hopefully, this matter can be resolved promptly, so the parties can begin to bring some order to a chaotic situation.

For these reasons, the plaintiff's motion for summary judgment is denied without prejudice.

ENTER:

JUDGE

Dated: